

1986

# Glade Stevens, Milton Stevens, Margaret Stevens v. Ellen I. Stevens : Reply Brief

Utah Supreme Court

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UTAH COURT OF APPEALS  
BRIEF

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IN THE SUPREME COURT OF UTAH

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STATE OF UTAH

DOCKET NO. 860138-CA

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GLADE STEVENS, MILTON STEVENS,  
and MARGARET STEVENS,

Plaintiffs and Respondents,

vs.

ELLEN I. STEVENS,

Defendant and Appellant.

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860138-CA  
Case No. 20801

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REPLY BRIEF OF APPELLANT

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Appeal from Judgment of the Fourth Judicial District Court  
for Millard County

Honorable George E. Ballif

---0000000---

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FILED

JUL 29 1986

Clerk, Supreme Court, Utah

IN THE SUPREME COURT OF UTAH

STATE OF UTAH

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GLADE STEVENS, MILTON STEVENS,  
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## LEGEND OF PAGE CITATIONS

Because the Clerk of the District Court failed to number all pages (pleadings, hearing transcripts, depositions, and exhibits) sequentially, it has been necessary to use different citations for each area as follows:

PL.	Pleadings filed with the District Court
TR.	The Trial Transcript
EX., pp.	Exhibits admitted at trial, with page no.'s

IN THE SUPREME COURT OF UTAH

STATE OF UTAH

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GLADE STEVENS, MILTON STEVENS,	:	
and MARGARET STEVENS,	:	
	:	
Plaintiffs and Respondents,	:	
	:	Case No. 20801
vs.	:	
	:	
ELLEN I. STEVENS,	:	
	:	
Defendant and Appellant.	:	

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**REPLY BRIEF OF APPELLANT**

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**STATEMENT OF ISSUES**

Appellant submits that the Statement of Issues in her Brief of Appellant accurately state the issues raised on appeal. Respondents' Statement of Issues is nothing of the sort. It appears to be a mixture of a statement of the case together with a statement of facts without any record citations, does not indicate a dissatisfaction with the statement of the issues set forth by the Appellant and should therefore be disregarded.

**STATEMENT OF THE CASE**

Appellant submits that the Statement of the Case in her Brief of Appellant accurately states the nature of the case, the course of proceedings, and its disposition in court below. Respondents' Statement of the Case attempts to indicate, paragraph by paragraph, which party's draft of the Findings of

Fact and Conclusions of Law was accepted by the trial court. It is not properly a statement of the case and should be disregarded as such.

#### **STATEMENT OF FACTS**

Respondents' Statement of Facts, like their Statement of Issues and Statement of the Case, is nothing of the sort. It is largely argument which should be contained in their response to either Appellant's Issue I or Issue III. Appellant will address those arguments in the indicated issues. Such facts as Respondents do include with their argument, both in the Statement of Fact and elsewhere throughout the brief are incompletely cited, incorrectly cited, or entirely uncited. It is difficult, therefore for the Appellant to respond fully to such alleged facts.

Respondents accurately set forth the testimony of the Appellant at Tr. 206-208, with the exception of the deletion of one question and answer on Tr. 207. However, nowhere in the Brief of Respondents do the Respondents tie this testimony in with any argument on any issue.

Respondents next claim that Appellant valued the estate by her testimony found at Tr. 218 where she was cross-examined on the purchase price of the two homes of the parties. A review of the testimony indicates that she was not willing to commit to any definite price.

Respondents then set forth the Respondent Glade Stevens' testimony concerning the value of those items of property found

by the Court to be divisible as part of the marital estate. Except where Respondents indicate, at page 13 of their Brief of Respondents, that Appellant concurred in the valuation of the furniture in the new home, Appellant finds no fault with the recapitulation of Glade Stevens' testimony concerning his belief of the values. Respondents provide no cite for Appellant's alleged concurrence and she is aware of no such concurrence. Glade Stevens valuations of the property are contradicted by those provided by Appellant's appraiser, Thomas Kysar (Tr. 276-391; Ex. 12). A parallel comparison of these conflicting values is set forth as an excerpt from Appellant's Written Final Argument in her Addendum to her Brief of Appellant.

## **ARGUMENT**

### **POINT I**

**THE COURT ERRED IN FAILING TO SUBMIT WRITTEN FINDINGS WITH REGARD TO THE VALUE OF EACH OF THE CONTESTED ITEMS OF PROPERTY OF THE MARITAL ESTATE.**

Respondents present no argument or authority on Appellant's primary issue that the trial court erred in failing to submit written findings with regard to the value of each contested item of property in the marital estate. Apparently they are conceding error in this regard.

Respondents do argue, in the Statement of Facts that no such findings should be made with regard to property found to be outside the marital estate. However, as set forth in the Brief of Appellant, Point III, Appellant has appealed the correctness



of that decision with regard to those items contained on a security agreement (Ex. 4) executed by the Respondent Glade Stevens in favor of his father, the Respondent Milton Stevens, in contemplation of trial. It is obvious that the Respondents did not consider these items to belong to Milton Stevens or they would not have executed a security agreement. Such would be unnecessary if they already belonged to him. Apparently what the trial court did was determine that because of the amount of money claimed to be owing to Milton Stevens or other creditors by Glade Stevens on each of these items was in excess of the value of the item and it was easier to dispose of it by saying it belonged to Milton than to work through the conflicting testimony on the values and the indebtedness.

Because the question of whether or not these items adds value to the marital estate depends largely on the court's resolution of the conflicting testimony on the present fair market value of the item less any provable indebtedness, it is necessary that the trial court be required to assess a value to all those items.

With regard to the 360 acres of farm land titled in the names of the Respondents Milton and Margaret Stevens, Appellant does not now claim that they are properly included in the marital estate and therefore need not be valued. All other items are still claimed by the Appellant as belonging to the marital estate and should be valued.

The Respondents further argue, under Point I, that since the

court referred, in its written Decision (Pl. 305), to an appraisal exhibit attached to the Respondents' written summation that it therefore adopted that recapitulation of the Respondents' claimed values as its own. This is without foundation in the record. This appraisal exhibit (Set forth in the Addendum to this Reply Brief of Appellant), was referred to by the trial court only to identify certain items of property which it was finding belonged to Milton Stevens and not to the marital estate. No mention is made anywhere in the Court's Decision of the value of any of the property.

The remainder of the Respondents argument under Point I is that the division of the marital estate is fair. This should rather have been addressed in Point III. It should be noted that the figures set forth by the Respondents are their own claimed values and not those claimed by the Appellant. Even so there are some glaring errors. First, Respondents indicate that the Appellant was given control fo the children's savings accounts in the sum of \$4,000.00. This is not mentioned anywhere in the findings or decree. Secondly, the Court awarded to Respondent Glade Stevens two ford pickup trucks and a Ford Truck used in the farming business. (Pl. 304-5, 357). In his listing of values he conveniently lists only the two pickup trucks. (See, Plaintiff's Ex. 9). He denied the existence of the other Ford truck (See, Appraisal Exhibit attached to Respondents' written summation, Addendum), and therefore gives it no value. This item was

appraised by Appellant's appraiser at \$20,000.00. (Exhibit 12, p. 21. Finally Respondents list as a liability the \$27,000.00 mortgage on the new home of the parties to the marriage. They neglect to mention, however, that there is a certificate of deposit being held by the bank in the amount of \$27,700.00 to secure payment of the mortgage. (Deposition of Glade Stevens, pp. 22-3, Published at Tr. 154). This asset was not mentioned by the Court in distributing the property. Apparently it is still in existence and in the possession of the Respondent Glade Stevens, or has been used to pay off the home. In either case the mortgage debt is not a liability of the Respondent Glade Stevens.

Respondents have failed to provide authority which would counter the clear holding of Jones v. Jones, 700 P.2d 1072 (Utah 1985), requiring the trial court to make specific findings as to the value of each disputed item belonging to the parties. This matter must be remanded to the trial court with direction that it place a value on each item, including those items found by the Court to belong to Milton Stevens.

#### POINT II

THE COURT ERRED IN FAILING TO SET A DOLLAR FIGURE ON THE RESPONDENT'S INCOME.

As in their response to Point I, the Respondents have completely failed to address the issue of whether the court is required to make a specific finding as to the amount of income being earned by the Respondent Glade Stevens at the time of the

divorce. What they did do is argue, as they have elsewhere herein, that because Appellant submitted a draft set of Findings of Fact and Conclusions of Law in keeping with the Court's written decision, which the court ordered the Respondent's to incorporate into the findings for the Court's signature, that the Appellant cannot subsequently object to those findings and conclusions. Appellant has addressed this in Point I of her Brief of Appellant and no authority or logic is cited by Respondents in contravention thereof.

Respondents next argue that the decision of the Judge with regard to child support and alimony is fair because the Respondent Glade Stevens has insufficient income to pay more. Although this argument should properly be under Point IV, it will be answered here because Respondents completely fail to address this issue under Point IV.

It is argued that Glade Stevens' only income for 1984 will be from the sale of his hay with an expectation of \$10,000.00. Apparently he would have this Court believe that that is his sole income. However, this is only his income from growing hay. No mention is made from the income from his trucking operation or of his other farming operations of wheat and oats. Respondent Glade Stevens testified that he only has 70 acres in hay. The remainder was in wheat and oats. (Tr. 149). This remainder is 35 acres of land that he farms. (Tr. 96, 97, 98). His tax returns are before the court showing his historical earnings. Un-numbered exhibit, Tr. 445). They do not indicate

impecuniousity.

The Respondents have failed to provide authority or logic in contravention of Appellant's request that the trial Court be required to make a specific finding as to the Respondent Glade Steven's income at the time of the decree. That should be the order of this Court.

### POINT III

#### THE COURT ERRED IN FAILING TO MAKE A FAIR AND EQUITABLE DISTRIBUTION OF THE PROPERTY OF THE PARTIES.

In responding to Appellant's argument that the property division was inequitable, Respondents attack the appraisal prepared by Appellant's witness Thomas O. Kysar, of Certified Business Appraisals, Inc. and list the fact that Mr. Kysar included in his appraisal several items of equipment which did not belong to any of the parties, that there was an error in computing the weight of one stack of hay and that the appraisal included hay which the Respondent Glade Stevens claimed at trial did not belong to him.

Respondents quote that portion of the record wherein Mr. Kysar cannot explain why his figures would indicate that a hay bale would weigh about 1960 pounds. (Tr. 320). They do not include his testimony where, after the noon recess he explains the nature and cause of the computational error (Tr. 380). This is obviously a deliberate attempt to mislead this court.

Next Respondents claim that that Mr. Kysar testified that he mistakenly included all six stack of hay in his appraisal. This

is again a deliberate misrepresentation of Mr. Kysar's testimony. In fact Mr. Kysar testified that he appraised all six stacks because they were on the property and only one was identified by the Respondent Glade Stevens as belonging to someone else when he was showing the hay to Mr. Kysar. (Tr. 324-328): Mr. Kysar's report even indicates that one stack does not belong to the parties, but that his appraisal is of all the hay on the property.(Ex. 12, p. 20).

Respondents conclude, without citing any evidence, that only one of the six appraised stacks of hay belonged to the parties. There is no cite to this authority because there is no such evidence. Ross Stevens, a cousin of Glade Stevens, called by the Respondents, testified that three of the stacks belonged to him (Tr. 185-6). No other explanation was made as to the ownership of the other stacks. It is reasonable to assume, absent explanation, that the hay stacked on the Respondent Glade Stevens property belonged to Glade Stevens.

Respondent's again mischaracterize Mr. Kysar's testimony concerning the hay when they claim that he admitted to a mistake in his evaluation of the value of the hay, when in fact what he acknowledged was that there was a disparity between two figures explained in part by including some hay not belonging to Respondent Glade Stevens.

Another mischaracterization of Mr. Kysar's testimony is in his report of the amount of hay hauled by Respondent Glade

Stevens. Mr. Kysar's appraisal indicated that about 415 tons of Stevens hay had been hauled by Glade during the first 7 months of 1984. This information was gleaned from trip reports supplied Mr. Kysar by Glade. Counsel for Respondents tried to convince Mr. Kysar that the maximum that could have been grown on 65 acres was 325 tons. Mr. Kysar acknowledged that if this were true then there was a possibility of an error in Glade's trip reports. (Tr. 338) This is a far cry from acknowledging he had made an error.

The remainder of the claimed errors in the appraisal were the inclusion of items not owned by the parties. Mr. Kysar acknowledged from the outset that he was not certain as to what assets belonged to the parties because of the lack of cooperation from Respondent Glade Stevens. (Tr. 292). His testimony, on direct examination was that his appraisal as to the value of equipment and machinery would have to be reduced for each item which was shown not to belong to the marital estate, and should be increased by those items not included in his list. (Tr. 286-292). (This however did not effect the fair market value of the trucking and farming operation as a going concern, Tr. 300-311).

Far from discrediting the testimony of Mr. Kysar concerning the value of the property as claimed by the Respondents, the appraiser's candor, in acknowledging that the values should be reduced if the property does not belong to the parties, bolsters his testimony.

#### POINT IV

THE AWARD OF CHILD SUPPORT AND ALIMONY ARE INADEQUATE IN LIGHT OF THE RECORD AS IT NOW STANDS.

Although Respondents include a Point IV in their Brief of Respondent it bears no relationship to Appellant's Point IV. They did in fact discuss the appropriateness of the Court's ruling in Point II, as discussed earlier.

Further, Respondents include in Point V information which they may have intended to be in Point IV. They attempt to show that because his bank and checking accounts were overdrawn for several months in large sums that he obviously cannot afford to pay more child support. Far from showing that, because of the large sums involved and the banks generous forbearance, it implicitly indicates that the bank feels he is good for any amounts overdrawn. Again, no mention is made of the \$27,700 certificate of deposit retained by the bank as security on one of the notes.

Although we do not have the Court's findings as to the annual income of the Respondent Glade Stevens, it can be readily seen that he has more and enough to pay considerably more child support and alimony than was ordered by the Court. The Appellant's needs, due to her learning disabilities and lack of employment skills mandates a finding of an abuse of discretion in setting the child support and alimony at such low levels.



#### POINT V

THE COURT'S ORDER CONCERNING THE PROVISION OF HEALTH AND DENTAL INSURANCE BY THE RESPONDENT GLADE STEVENS IS INADEQUATE.

Absolutely nothing in Respondents' brief addresses this issue. No reply is therefore made.

#### POINT VI

IT WAS ERROR FOR THE TRIAL COURT TO REFUSE TO AWARD COSTS INCURRED IN OBTAINING AN APPRAISAL OF THE FARMING AND TRUCKING BUSINESSES OWNED BY THE PARTIES.

Respondents respond to the above cited error by first raising the issue that Appellant had a hand in drafting the Findings of Fact and Conclusions of Law. This question has been addresssed elsewhere.

Respondents also raise the issue raised by them in their motion to dismiss, i.e. that the Appellant, having executed upon the judgment, has accepted whatever benefit may be hers and is foreclosed from seeking additional relief. This Court disposed of this issue in denying Respondents' motion to dismiss.

#### CONCLUSION

Respondents have raised no substantial legal or logical argument in contravention of the Brief of Appellant and Appellant should be awarded her requested relief. Further, this Court should consider sanctions under Rule 24(k), Utah Rules of Appellate Procedure, to include disregarding or striking the Brief of Respondents and the assessment of attorneys fees against

counsel for Respondents.

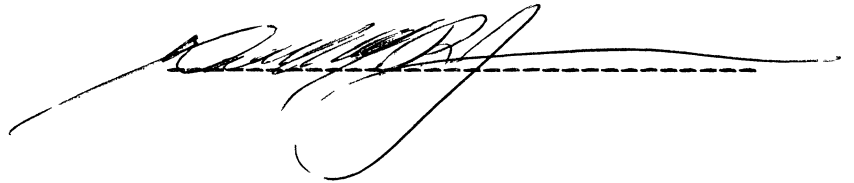
RESPECTFULLY SUBMITTED this 29 day of July, 1986.



DONALD R. JENSEN  
Attorney for Appellant

**CERTIFICATE OF SERVICE**

I hereby certify that I mailed four true and correct copies of the foregoing Appellant's brief, postage prepaid, to Eldon A. Eliason, attorney for Respondents, Box 605, Delta, Utah 84624, this 29 day of July, 1986.



## **ADDENDUM**

Respondents' Appraisal Exhibit, attached to Written Summation

# APPRAISAL EXHIBIT Security Agreement to Milton Stevens:

Item	CBA Appraisal	Plaintiff Appraisal	Owed	Equity	Apprais
79 Freight-ner	\$39,000.00	\$24,000.00	\$31,000.00	-\$1000	Ogier
Trailer		\$6,000.00			
ndrower	\$28,800.00	\$16,000.00	\$32,000.00	-\$16,000	Warner
le Wagon	\$30,400.00	\$32,000.00	\$21,742.00	\$10,258	"
83 Case					
Tractor	\$26,500.00	\$26,500.00	\$18,500.00	-\$5,000	"
		Repair, \$13,000			
Ton IH Truck	\$30,000.00	\$8,000.00	\$10,000.00	-\$8,000	owed Milton
			\$6,000.00	owed Bank	"
mbine	\$38,400.00	\$37,000.00	\$40,000.00	-\$3,000	Watcott
y Baler	\$5,600.00	\$5,600.00	\$12,433.00	-\$6,833	Kysar
us Equity in Secured Property:				-\$29,575	
Earl Stevens					
Property	\$25,000.00	\$12,600.00	\$13,454	to Earl	
TOTAL DEBT: 195,836.00			\$10,707.11	to Milton Steven	
cal Debt above value: \$56,852.11					
us Equity in Earl Stevens farm				-\$11,561.11	
TAL MINUS EQUITY				-\$41,136.11	
Security Agreement Items:					

ver	Obsolete, Miltons				
to Mower	Obsolete, Miltons				
row	Obsolete, Miltons				
ish Harrow	\$461 Miltons				
Case Tractor	\$3,800, Miltons (acquired 1971 before marriage)				Warner
heeler	\$1,300			\$1,300	Cost
in Drill	\$3,500			\$3,500	Warner
tivator	Obsolete Miltons				
'6 Ford					
Pickup	\$1,500		Owe \$950 Kimball's	\$550	Warner
stbuster					
low	\$1,200			\$1,200	Kysar
n Deer Rake	\$5,300, Miltons				
ctor	\$300.00 Ross Stevens half			\$300	
o	\$1,100			\$1,100	Warner
ris Rod					
eder	\$1,600			\$1,600	Kysar
pressor	\$100			\$100	Kysar
der	\$1,000 Miltons				Kysar
cher	\$50			\$50	Kysar
Lift	\$2,100			\$2,100	Kysar
l Tank	\$275			\$275	Kysar
home	\$37,063.00	\$30,000.00	\$9,500.00	\$20,500	Cost
Home	\$49,921.00	\$65,000.00	\$27,717.00	\$37,283	Cost
niture &					
pliances		\$5,800.00		\$5,800	
0 Mercury		\$5,200.00		\$5,200	Warner
ldren's					
vings		\$4,000.00		\$4,000	MEA
Total unsecured property					

Nonexistant or defendant's appraised items:

2 ton Ford  
Mobile Home (Robert DeJoge)  
Utility Trailors  
Farmall F236 tractor  
1978 IH 1/2 ton truck  
Canyon Road home  
Cash in bank, \$27,700

ASSETS:

Cash in Bank	\$9,500 Overdraft
Accounts Receivable	\$7,500
Inventory of Hay	\$10,000 less one fourth, Purchaser Ogier
Accounts Payable	\$15,000

Inventory on Hand

Approximately 200 ton hay at \$50 per ton--\$10,000, minus 1/4 to lessor or \$7,500.

No other inventory.

Amount presently owing First Security Bank:

\$9,500 on old home  
\* \$27,717 on new home  
\* \$6,000 on International Truck  
\* \$7,400 Windrower

\* Are included in the amount owed on secured indebtedness

SUMMARY

Total unsecured property--\$84,858  
Defendant has in her possession --\$52,283  
Plaintiff has in his possession --\$32,575